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Supreme Court, U.S.
FILED
MAY 29 1998
OFFICE OF THE CLERK

No. 97-1440

In the Supreme Court of the United States

OCTOBER TERM, 1997

CLIFFORD F. GURNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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25 pp

QUESTION PRESENTED

Whether the espousal and settlement of claims asserted by United States nationals against the Government of Iran resulted in a "taking" of property requiring just compensation under the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not yet reported. The opinion of the Court of Federal Claims (Pet. App. 18a-29a) is reported at 36 Fed. Cl. 482.

JURISDICTION

The judgment of the court of appeals was entered on December 4, 1997. The petition for a writ of certiorari was filed on March 3, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are United States nationals who assert that their property interests were damaged or im-

paired by the Government of Iran during the Islamic revolution. In 1990, petitioners' claims against Iran, along with similar claims of other United States nationals, were espoused by the United States and settled for a lump sum payment.[1] The United States, through the Foreign Claims Settlement Commission, then adjudicated each United States national's claim and made awards, which were paid on a pro rata basis out of the settlement proceeds. Petitioners maintain that those payments do not reflect the full value of their claims. They therefore contend that the United States' espousal of their claims was a "taking" of their property without just compensation, in violation of the Fifth Amendment. Pet. App. 1a-6a.

1. On November 4, 1979, the American Embassy in Tehran was seized and American personnel were taken hostage. In response, the President of the United States, among other actions, blocked the transfer or removal of all assets of the government of Iran subject to the jurisdiction of the United States. To resolve the ensuing diplomatic crisis, the United States and Iran entered into an international agreement that took the form of adherence to a series of declarations by the Democratic and Popular Republic of Algeria. This agreement, known as the Algiers Accords, generally provided for the release of hostages and return of Iranian assets. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 662-666 (1981).

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[1] "A claim is espoused by the United States * * * when the government of the United States, usually through diplomatic channels, makes it the subject of a formal claim for reparation to be paid to the United States by the government of the state responsible for the injury." Restatement (Second) of Foreign Relations Law of the United States § 211 cmt. b (1965).

The Accords also established procedures for resolving claims asserted by United States nationals who alleged that their property, contract rights, or other interests were impaired by Iran in the course of events surrounding the breach in relations between the two nations. The Accords provided that the two governments would terminate litigation brought by their nationals against the other government and instead seek to resolve such claims through binding arbitration. Declaration of the Government of the Democratic and Popular Republic of Algeria Relating to the Commitments Made by Iran and the United States, 20 I.L.M. 223, 224 (1981) (Iran-U.S. Commitments).

To further that goal, the Accords established at The Hague the Iran-United States Claims Tribunal, an international arbitral tribunal authorized to hear, among other matters, claims by the United States or United States nationals against the Government of Iran. Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, art. II(1), 20 I.L.M. 230 (1981) (Iran-U.S. Settlement). The Tribunal was authorized to arbitrate any claim not settled within six months and to enter a final and binding arbitral award. *Id.*, arts. I, II(1), IV, 20 I.L.M. at 230-232.

The Accords gave the Tribunal jurisdiction over claims of United States nationals "aris[ing] out of debts, contracts, * * * expropriations or other measures affecting property rights." Iran-U.S. Settlement, art. II(1), 20 I.L.M. at 231. They also gave the Tribunal jurisdiction over certain government-to-government disputes arising out of contractual ar-

rangements for the purchase and sale of goods and services. *Id.*, art. II(2), 20 I.L.M. at 231. Claims of United States nationals of less than $250,000 were to be presented to the Tribunal by the United States government. *Id.*, art. III(3), 20 I.L.M. at 231. Larger claims were to be presented by the claimants themselves. *Ibid.* Finally, the Accords established a security account, initially funded with $1 billion of previously blocked Iranian assets, to ensure payment of Tribunal awards in favor of the United States and United States nationals. Iran-U.S. Commitments, Point I(7), 20 I.L.M. at 226.

2. The United States negotiated with Iran to resolve the small claims of United States nationals and certain other claims of the government of the United States.

a. In anticipation of a settlement of those claims, Congress passed legislation in 1985 giving the Foreign Claims Settlement Commission jurisdiction to adjudicate the individual small claims of United States nationals in the event that the United States and Iran reached an agreement settling all such claims for one lump sum. Foreign Relations Authorization Act, Pub. L. No. 99-93, Tit. V, § 501, 99 Stat. 437, 50 U.S.C. 1701 note. The Foreign Claims Settlement Commission is an independent agency established within the Executive Branch and now located within the Department of Justice. International Claims Settlement Act of 1949, 22 U.S.C. 1621 *et seq.* It has jurisdiction to "receive, examine, adjudicate, and render final decisions" with respect to certain individual claims of the United States and United States nationals against a foreign government where the United States has agreed to settle a set of such

claims en bloc, through the receipt of a lump sum payment. 22 U.S.C. 1623(a).

In deciding individual claims, the Commission is directed first to apply the provisions of the pertinent claims agreement and then to apply principles of international law, justice, and equity. 22 U.S.C. 1623(a). Members of the Commission are empowered to take evidence and to examine witnesses in the course of adjudicating each claim. The decision-making process, however, is not an adversarial one, and neither the foreign government nor any other party appears before the Commission to contest the claimant's position. 22 U.S.C. 1623(b)-(d) and (h). Claimants are entitled to notice of the Commission's decisions and to an administrative hearing if dissatisfied with the Commission's decision. 22 U.S.C. 1623(h). The Commission's final action allowing or denying a claim is conclusive and not subject to further administrative or judicial review. 22 U.S.C. 1623(h).

The 1985 Act gave the Commission authority to "receive and determine the validity and amounts of claims by nationals of the United States against Iran which are settled en bloc by the United States." Foreign Relations Authorization Act, Pub. L. No. 99-93, Tit. V, § 501(a), 99 Stat. 437. The Act directed the Commission to apply, in the following order, the terms of any settlement agreement, relevant provisions of the Algiers Accords, and applicable principles of international law, justice, and equity. *Ibid.* It also directed the Secretary of the Treasury to pay Commission awards in accordance with the provisions of 22 U.S.C. 1626 and 1627. Pub. L. No. 99-93, Tit. V, § 501(b), 99 Stat. 437-438.

Those statutory provisions specify that the proceeds of a lump sum settlement subject to the Com-

mission's jurisdiction are first deposited in a special, interest-bearing fund established in the Treasury. 22 U.S.C. 1627(a). The Secretary of the Treasury is authorized and directed to pay duly certified Commission awards out of that special fund. 22 U.S.C. 1627(e). The statute further establishes a set of priorities for the payment of Commission awards in the event that the proceeds of the lump sum settlement and any accrued interest are insufficient to make full payment. Those priorities essentially require the Secretary of the Treasury to make an initial payment of all or a portion of the principal of the award.[2] The initial payment is then followed by a pro rata payment of outstanding principal and interest based on the ratio between: (1) the total amount remaining in the pertinent Treasury fund and (2) the total amount of unpaid principal and interest. 22 U.S.C. 1627(e)(2) and (3).

b. On May 13, 1990, the United States and Iran agreed to settle for a lump sum payment of $105 million all claims of U.S. nationals of less than $250,000 as well as several claims of the Government of the United States for unpaid loans extended to Iran by the Unites States Agency for International Development. See Pet. App. 30a-40a. The settlement agreement provided that, in consideration of the lump sum payment, the United States would release Iran from all further liability on the claims subject to the agreement. *Id.* at 36a. It also provided that tangible

[2] The International Claims Settlement Act generally provides for the payment of up to the first $1000 of the principal of a Commission award. 22 U.S.C. 1627(c)(1). Those provisions were, in the case of claims against Iran, modified to permit payment of the first $10,000 of principal. Pub. L. No. 99-93, Tit. V, § 501(b)(1), 99 Stat. 437.

and intangible property underlying the subject claims and located in Iran would be "quitclaimed and transferred unconditionally" to the Iranian government. *Id.* at 37a.

The settlement agreement referred the individual small claims of United States nationals to the Foreign Claims Settlement Commission for adjudication. Pet. App. 34a. It did not, however, specify an allocation of the settlement proceeds between the United States' claims for repayment of its loans and the claims of United States nationals. It instead stated that distribution of the settlement "falls within the sole competence and responsibility of the Government of the United States." *Ibid.*

The Iran-United States Claims Tribunal ratified the settlement agreement on June 22, 1990, and the agreement became effective on that date. Shortly thereafter, the Department of State directed the Department of the Treasury to allocate $50 million of the settlement proceeds for payment of U.S. nationals, and transferred the small claims of U.S. nationals to the Foreign Claims Settlement Commission for individual adjudication. Pet. App. 23a.

c. The Commission completed adjudication of all small claims in February 1995. It granted awards on 1000 of the 3066 small claims adjudicated. Successful claimants were awarded a principal recovery based on the Commission's assessment of their economic injury, plus simple interest at approximately ten percent, running from the date of any Iranian governmental action found by the Commission to impair the claimant's property, through June 22, 1990, the effective date of the government-to-government settlement agreement. Pet. App. 24a.

The Commission entered awards with an aggregate value of approximately $42 million in principal and $45 million in interest. Pet. App. 24a. The total of all Commission awards exceeded the amount in the special Treasury fund established for payment of these claims.[3] The Secretary of the Treasury consequently made individual payments in accordance with 22 U.S.C. 1627(e)(2) and (3), which provided, in these circumstances, for full payment of the principal amount of every claim and a pro rata share—approximately 34.5%—of the interest awarded. Pet. App. 24a.

3. Petitioners are 22 individuals, private corporations, and educational institutions that received payments from the Treasury in satisfaction of claims against Iran. They filed suit against the United States in the Court of Federal Claims, alleging that the United States, in espousing and then settling their claims against Iran, had taken their property without paying constitutionally adequate compensation, in violation of the Just Compensation Clause of the Fifth Amendment. Pet. App. 24a.

The Court of Federal Claims granted summary judgment for the United States. Pet. App. 29a. Applying the three-factor takings analysis set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), the court held that the espousal of petitioners' claims did not amount to a compensable taking. First, the court explained that petitioners could have no reasonable, investment-

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[3] There was $57.8 million available for payment: the $50 million originally allocated from the lump sum settlement and an additional $7.8 in interest that had accrued on the special Treasury fund. U.S. Dep't of Justice, *Foreign Claims Settlement Commission of the United States Annual Report* 7 (1995).

backed expectation that claims arising out of international commerce would remain unimpaired by government actions intended to restore the mutual amity upon which such commerce depends. Pet. App. 26a.

Second, the court, in assessing the character of the government action in question, found that the espousal of petitioners' claims was not a simple appropriation of property, but rather an exercise of the President's long-established power to take up and settle the claims of United States nationals when it was deemed necessary to preserve or restore harmonious international relations. Pet. App. 26a-27a.

Third, the court concluded that the espousal of petitioners' claims had not harmed their economic interests, noting that "there is nothing in the record to suggest that [petitioners] would have fared as well, much less better, had they been forced to go it alone." Pet. App. 28a. It therefore held that the alleged shortfall in petitioners' recovery, as measured against the Foreign Claims Settlement Commission awards, did not rise to a Fifth Amendment "taking" of property.

4. The Federal Circuit affirmed. Pet. App. 1a-14a. The court of appeals reasoned that although in its view petitioners' claims do not fit neatly within the "regulatory takings" analysis, the *Penn Central* factors applied by the trial court remained relevant to evaluation of petitioners' takings claim. *Id.* at 8a. Applying those and other factors, the court concluded that the government's espousal of petitioners' claims and the settlement agreement did not effect a compensable taking.

First, the court noted that petitioners had derived a substantial benefit from the government's settlement of their claims. Quoting *National Board of Young Men's Christian Ass'ns* v. *United States*, 395 U.S. 85,

92 (1969), the court stated that where, as in this case, "the private party is the particular intended beneficiary of the governmental activity, 'fairness and justice' do not require that losses which may result from that activity 'be borne by the public as a whole,' even though the activity may also be intended incidentally to benefit the public." Pet. App. 11a.

Second, the court reasoned that two Claims Court cases relied on by petitioners, *Meade* v. *United States*, 2 Ct. Cl. 224 (1866), aff'd, 76 U.S. (9 Wall.) 691 (1869), and *Gray* v. *United States*, 21 Ct. Cl. 340 (1886), did not support petitioners' takings claim. The court noted that both cases involved instances in which the United States had extinguished individual claims against a foreign nation to further diplomatic objectives. The court explained, however, that neither case entered a monetary award for the plaintiffs or otherwise held that compensation was required by the Fifth Amendment. Pet. App. 11a-12a.

Finally, the court explained that petitioners' property interests in claims arising out of consensual international transactions were held subject to the government's established power to affect the assertion of claims against a foreign nation in order to maintain a degree of international amity. Pet. App. 13a. The court concluded that, in this case, the government had "provided an alternative tailored to the circumstances which produced a result as favorable to [petitioners] as could reasonably be expected." *Ibid.* It therefore held that petitioners had failed to establish that the government had effected a compensable taking of their property. *Id.* at 14a.

Judge Clevenger filed a concurring opinion. Pet. App. 14a-18a. In his view, "when one ventures into international commerce, it is with knowledge of the

extent to which that marketplace is regulated." *Id.* at 16a. Accordingly, a "taking by espousal is not automatically compensable, because no rational international commerce plaintiff could unblushingly assert shock or surprise that its property was seized by espousal." *Id.* at 17a. Although he noted that "there may be instances in which the governmental interests in espousal are so weak, or otherwise in question, that an espoused plaintiff may successfully show, in a rule of reason analysis, entitlement to compensation," he stated that petitioners had failed to make that showing in this case. *Ibid.*

ARGUMENT

Petitioners assert (Pet. 10) that the settlement of their claims violated the Fifth Amendment. Yet, despite a nearly 200-year history of the government's espousal of individual claims against foreign nations, petitioners are unable to cite a single case in which such governmental action has been held to be a "taking" requiring payment of just compensation. The court of appeals' decision correctly rejected petitioners' novel takings claim, and its decision is entirely consistent with this Court's precedent. Further review is therefore unwarranted.

1. Petitioners contend (Pet. 12-15) that the court of appeals' decision is inconsistent with this Court's decisions in *Dames & Moore* v. *Regan*, *supra*, and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974), which hold that, absent a congressional decision to withhold the remedy, the Tucker Act affords federal jurisdiction for claims that the United States has taken property without just compensation. Petitioners further argue (Pet. 15-18) that the decision below is inconsistent with *Monongahela Navi-*

gation Co. v. *United States*, 148 U.S. 312 (1893), which holds that where the government "takes" property, the judiciary decides whether the compensation afforded is constitutionally sufficient.

Petitioners' arguments are based on a misreading of the court of appeals' opinion. Nothing in the decision below purports to hold that petitioners cannot invoke Tucker Act jurisdiction. Nor does it suggest that, where a governmental action constitutes a compensable "taking" of property, the judiciary is bound to deem constitutionally sufficient any compensation afforded by the Legislative or Executive Branch. Rather, the court of appeals assumed jurisdiction over petitioners' Tucker Act action, evaluated petitioners' takings claim on the merits, and held that petitioners had not established that the government's espousal and settlement of their claims amounted to a "taking" implicating the Fifth Amendment requirement of "just compensation." Nothing in that holding is inconsistent with this Court's decisions regarding the availability of Tucker Act jurisdiction for a takings claim or the role of the judiciary in determining whether the government has paid constitutionally adequate compensation for a "taking" of property.

2. Petitioners assert (Pet. 18-21) that the court of appeals' decision, by focusing on the benefits afforded claimants by the settlement agreement, misinterpreted this Court's decision in *National Board of Young Men's Christian Ass'ns* v. *United States*, 395 U.S. 85, 92 (1969). *YMCA* arose from a suit against the United States for just compensation for losses sustained by the plaintiff when buildings it owned in the Panama Canal Zone were damaged by a mob of rioters and then occupied by United States troops for protection. This Court held that, "where * * * the

private party is the particular intended beneficiary of the governmental activity, fairness and justice do not require that losses which may result from that activity be borne by the public as a whole, even though the activity may also be intended incidentally to benefit the public." *Id.* at 92 (internal quotation marks omitted). The court of appeals in this case, citing *ibid.*, noted that the United States entered into the lump sum settlement here to further the interests of both the petitioner-claimants and the United States, that petitioners were among the specific intended beneficiaries of the agreement, and that petitioners had obtained recoveries that were as favorable to them as could reasonably be expected. Pet. App. 10a-11a, 13a.

Petitioners assert (Pet. 20-21) that *YMCA*'s holding should be limited to instances in which the government invades or occupies physical property to protect it or to further law enforcement objectives. In petitioners' view, any assessment of the economic benefits afforded a takings claimant in other circumstances would nullify the Fifth Amendment's "just compensation" requirement by denying recovery whenever "substantial" economic benefits are conferred in the course of the conduct alleged to be a "taking" of property.

Petitioners' contentions are mistaken. First, the principle animating *YMCA*—that actions intended to benefit the property owner do not generally constitute a taking—is not limited to the narrow circumstances in which the government furthers a law enforcement or protective purpose. Rather, a taking will rarely be found where the governmental action affecting property generally confers substantial, reciprocal benefits on the property owner. *Keystone*

Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470, 491 (1987); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

Here, the benefits accruing to petitioners were direct, immediate, and substantial. In lieu of an inchoate and uncertain claim against a foreign sovereign, petitioners first were afforded a procedure, through the Tribunal, for maintaining their claims. They then were given a right to present their claims in a nonadversarial, administrative setting before the Commission in which no party challenged the merits of the claim or asserted defenses to liability, and under procedures designed to ensure that sufficient funds would be available to pay a substantial portion of any compensation awarded. As the trial court observed, "there is nothing in the record to suggest that [the petitioners] would have fared as well, much less better" had petitioners been required to pursue their claims against Iran in the courts of Iran or the United States, or later before the Tribunal. Pet. App. 28a. In recognizing that these direct benefits militated against finding a "taking," the court of appeals adhered to well-established law and did not depart from this Court's takings precedents.

Second, petitioners err in contending that a "taking" must be found whenever the benefits received from the governmental action do not equal or exceed the diminution in value of the affected property interest. That contention is predicated on the dubious assumption that the "value" of petitioners' claims is equal to the full face value of the alleged damages plus interest—without any discount for the possibility that petitioners might not have prevailed on the merits in a suit in the Tribunal or in a United States or foreign court against the government of Iran or

succeeded in obtaining full satisfaction of any resulting judgment in their favor.

Moreover, even assuming that their claims should not be so discounted, petitioners err in asserting (Pet. 20 n.27) that a taking occurred merely because "whatever 'benefit' petitioners received was less than what was taken from them." "The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule [of reciprocity of advantage] in excess of the benefits received." *Keystone Bituminous Coal Ass'n*, 480 U.S. at 491 n.21. Petitioners' assertion that any government action is a taking if it diminishes the value of property or fails to afford benefits of exactly equivalent value has no support in the case law. Cf. *Andrus* v. *Allard*, 444 U.S. 51, 65 (1979); *Goldblatt* v. *Hempstead*, 369 U.S. 590, 594 (1962).

Finally, contrary to petitioners' contentions (Pet. 20-21), this is not a case in which the government has paid only partial "compensation" for property otherwise taken. Cf. *Suitum* v. *Tahoe Reg'l Planning Agency*, 117 S. Ct. 1659, 1671 (1997) (Scalia, J., concurring in part and concurring in the judgment). It instead involves a governmental action that, while furthering important diplomatic objectives, also inherently benefitted petitioners and U.S. claimants generally by affording them a swifter and surer means of recovering on their claims, first in the basic settlement through the 1981 Accords, and then in the en bloc settlement of small claims within that framework. In considering those benefits, the court of appeals did not deviate from the constitutional standard of "just compensation;" it instead adhered to firmly established precedent holding that a "taking"

does not occur in the first instance where the governmental action provides direct and substantial benefits for the affected property owner.

3. Petitioners argue (Pet. 21-29) that the court of appeals' decision is inconsistent with *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). In that case, the Court held that governmental action that involves a physical invasion of property or denies all economically beneficial uses of land is a compensable taking "per se" (in the absence of a limitation inhering in the property that potentially subjected it to such governmental action), without further, case-specific inquiry into the impact on the claimant or the public interest underlying the challenged action. *Id.* at 1015. The principle of *Lucas* does not apply in this case, because the government did not occupy any physical property of petitioners, nor did it deprive them of all economically beneficial uses of their land.

a. This Court has never held that the impairment of a property interest in a legal claim or cause of action amounts to a per se taking requiring payment of just compensation. To the contrary, the Court has recognized a per se taking only where the governmental action extinguishes the right to either occupy or productively use real property. Government actions that are asserted to diminish the economic value of a claim or other property interests do not fall within those categories or otherwise amount to a taking per se. Compare *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) with *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. at 488-489 n. 18.

Petitioners could have had no reasonable expectation that their legal claims against a foreign sover-

eign would be held free of the government's powers of espousal and settlement. To the contrary, as the court of appeals recognized, "those who engage in international commerce must be aware that international relations sometimes become strained, and that governments engage in a variety of activities designed to maintain a degree of international amity." Pet. App. 13a. International agreements settling claims by nationals of one state against the government of another are an established international practice and have been used repeatedly by the United States government since 1799. See *Dames & Moore*, 453 U.S. at 679-680 & n. 8; *United States* v. *Pink*, 315 U.S. 203, 229-230 (1942); *United States* v. *Belmont*, 301 U.S. 324, 330-331 (1937). The "United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole." *Dames & Moore*, 453 U.S. at 680, quoting Louis Henkin, *Foreign Affairs and the Constitution* 262-263 (1972).

Despite this long-established practice, petitioners fail to cite a single case in which the espousal and settlement of claims against a foreign nation have been held to be a "taking" requiring payment of just compensation. Petitioners assert (Pet. 25 n.29) that *Gray* v. *United States*, 21 Ct. Cl. 340 (1886), stands for that proposition. Pet. 25 n.29. *Gray*, however, is a Court of Claims advisory opinion on a matter referred to it by Congress; it expressly reserved to the legislature the question of whether any compensation would be provided for the claims settlement at issue and

cannot be construed as a holding concerning the requirements of the Fifth Amendment. *Id.* at 345.[4]

b. Nor, even assuming that *Lucas* applies to inchoate property interests like petitioners' choses in action,[5] did the government deprive petitioners of all economically beneficial uses of their property. Indeed, as both lower courts found (Pet. App. 13a, 28a), petitioners failed to show that the government's espousal and settlement of their claims diminished the value of the claims in any respect. As an initial matter, the Algiers Accords in 1981 afforded petitioners substantial benefits by establishing the Iran-United States Claims Tribunal for the resolution of

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[4] *Gray* is also factually distinguishable as it involved a settlement that extinguished the claim entirely without, as in this case, providing the claimant with an alternative remedy and substantial compensation. See *United States* v. *Sperry Corp.*, 493 U.S. 52, 59 n.6 (1989). Petitioners also rely (Pet. 27 n.30, 25 n.29) on Justice Chase's opinion in *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796). Justice Chase's opinion in *Ware*, however, merely expresses the view that compensation ought to be afforded to individual debtors whose economic interests were adversely affected by a treaty. The case did not involve an instance in which the government settled or extinguished the claims of U.S. nationals against a foreign sovereign. It thus has no relevance here.

[5] Petitioners' claims reflect, at best, a property right in a *potential* recovery, not a right to interest on tangible, concrete property or funds. Accordingly, in assessing the economic impact of the government's action on petitioners' property, the Fifth Amendment inquiry must focus on the extent to which the settlement agreement affected the value of those intangible claims. Cf. *Pittsburg Steel Co.* v. *Baltimore Eq. Soc'y*, 226 U.S. 455, 459 (1913) ("The question whether the remedy on this contract was impaired materially is affected not only by the precarious character of the plaintiff's right, but by considerations of fact,—of what the remedy amounted to in practice.").

claims against Iran and a fund to secure its awards, thereby substituting a regular procedure for the prior situation of grave uncertainty for claimants in the wake of the hostage crisis. The Accords, however, provided for the United States, not the claimants themselves, to present claims for less than $250,000. See pp. 3-4, *supra*. The Accords themselves therefore subjected petitioners' claims to a significant measure of control by the United States. Petitioners do not challenge that basic feature of the Accords.

Even so, petitioners' prospects of prevailing in arbitration before the Tribunal were uncertain. Before the settlement agreement, the Tribunal had dismissed some claims as untimely and dismissed other claims for lack of jurisdiction. Pet. App. 22a n.7. The settlement agreement, in contrast, gave petitioners a remedy that was not subject to those defenses. Indeed, the agreement gave a remedy to claimants who, because they had withdrawn claims from the Tribunal's consideration or failed to meet the Tribunal's filing deadlines, could no longer pursue *any* claim before the Tribunal. *Ibid.*[6] It also secured sums to pay claims awards and, by referring petitioners to the nonadversarial processes of the Foreign Claims Settlement Commission, enhanced petitioners' likelihood of recovery.[7]

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[6] In some cases, the Commission issued claims awards in cases in which Iran had not in fact expropriated petitioners' property. Pet. 4 n.6.

[7] That some petitioners might conceivably have obtained greater recoveries if permitted to pursue arbitration of their claims before the Tribunal does not establish that the government's actions rise to a compensable "taking" of property. Cf. *Sperry*, 493 U.S. at 59 & n.6; *New York Cent. R.R.* v. *White*,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1998

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243 U.S. 188, 202 (1917) (substitution of statutory workers compensation remedy for common law remedies does not deprive claimant of property without due process of law).